Supreme Court, U.S.
FILED
JAN 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-65

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA,

Petitioner,

—v.—

PROVIDENCE JOURNAL COMPANY and
CHARLES M. HAUSER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF OF RESPONDENTS IN SUPPORT OF THEIR MOTION TO DISMISS THE WRIT OF CERTIORARI

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At issue on this motion is the authority of an individual to represent the United States in this Court when the Attorney General and the Solicitor General have explicitly refused to authorize him to do so. 28 U.S.C. § 518(a) unambiguously provides that unless the Attorney General directs otherwise, either he or the Solicitor General is to conduct all suits and appeals in this Court "in which the United States is interested." The special prosecutor who claims to speak on behalf of the United States has now made explicit that "the Solicitor General declined to authorize [him] to appear before this Court in this case or file a petition for writ of certiorari" (Pet. Obj. 2 n.2).[1] That being so, and because there can be no serious dispute that the United States "is interested" in a criminal contempt case in

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1 References to "Pet Obj. __" are to Petitioner's Objection to Respondents' Motion to Dismiss the Writ of Certiorari.

which it is the party-petitioner, the writ of *certiorari* should be dismissed.

Petitioner suggests that, "notwithstanding section 518" (Pet. Obj. 5), this Court's decision in *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124 (1987) ("*Young*"), provides authority for a special prosecutor to represent the United States in this Court despite a decision of the Attorney General not to authorize him to do so. Yet nothing in this Court's decision in *Young*—a decision grounded in this Court's supervisory power over the lower federal courts—can be said to have rejected, *sub silentio*, let alone to have held unconstitutional, the specific statutory command embodied in section 518. *Young* did not address the question of who may represent the United States before this Court. Indeed, as petitioner readily admits (Pet. Obj. 5), the Solicitor General in that case specifically authorized special counsel appointed by the district court to appear in this Court on behalf of the United States.

In his attempt to extend this Court's ruling in *Young*, special counsel urges that section 518 should not be given effect on the ground that to do so would be to strip this Court of its powers to punish contempts of its own authority. (Pet. Obj. 5-6) That simply is not so. Respondents do not question this Court's power summarily to punish contempts occurring before it, or, if need be, to appoint a special prosecutor to initiate criminal contempt proceedings—with all the attendant constitutional and procedural safeguards—against one who may violate its orders. *See Young, supra*, 107 S. Ct. at 2131, 2132 n.8, 2134. *See also Bloom* v. *Illinois*, 391 U.S. 194 (1968).

Special counsel points to this Court's invitation to a private attorney to participate in the briefing and argument of *Bob Jones University* v. *United States*, 456 U.S. 922, 459 U.S. 812 (1982), 461 U.S. 574 (1983) ("*Bob Jones*"), and urges that giving effect to section 518(a) would preclude this Court from appointing an attorney in such a case. (Pet. Obj. 6) But this

Court did not appoint a private attorney to represent the United States in *Bob Jones*. The private attorney invited to participate in the briefing and argument of that case appeared—under the terms of this Court's invitation—as *amicus curiae* in support of judgments below with which the United States disagreed and which it hence refused to defend.[2] The United States itself was represented before this Court in *Bob Jones* by the Acting Solicitor General and by an Assistant Attorney General.[3]

It is difficult to understand how it could be said in this case —as the special prosecutor has maintained—that the district court will be left without a means of self-protection by application of section 518. (Pet. Obj. 2) Here the special prosecutor has pursued these criminal charges before both the district court and the Court of Appeals. As in *United States* v. *McKenzie*, 735 F.2d 907 (5th Cir. 1984), here the judiciary itself has already had the opportunity to review the allegedly contumacious conduct and has determined that criminal contempt does not lie. For special counsel now to observe that he "had good reason to believe that the court of appeals incorrectly reversed the conviction" (Pet. Obj. 6)—the same position unavailingly taken by the special prosecutors in *McKenzie*—simply ignores the very holding of that case.

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2 Petitioner's citations to the Stern and Gressman treatise (Pet. Obj. 6) are to the same effect. The authors note that this Court may at any time invite *amicus* participation in any case; they do not address the issue of who may properly represent the United States before this Court. *See* R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice*, §§ 13.13, 14.2, at 574, 581 (6th ed. 1986).

3 Petitioner's reliance on *United States* v. *Shipp*, 203 U.S. 563 (1906), also misses the point. In *Shipp* itself, the United States was represented by the Attorney General and the Solicitor General.

All else aside, special counsel's arguments simply fail to address the proposition that it lies within the province of Congress to decide whether a special prosecutor whom the Attorney General declines to authorize to seek review in this Court on behalf of the United States may nonetheless be permitted to do so. Since Congress has the power to vest in the Attorney General the authority to determine whether and how cases will be presented on behalf of the United States to this Court,[4] and since Congress has spoken clearly on the matter, its determination must be afforded full effect.[5]

4 *See* Respondents' Motion to Dismiss the Writ of Certiorari at 9.

5 When Congress has wished to curtail the Attorney General's discretion to decide whether to allow a special prosecutor to seek review by this Court or otherwise control his prosecutorial duties, it has explicitly done so. In enacting the independent counsel provisions of the Ethics in Government Act of 1978, 28 U.S.C. §§ 591 *et seq.* (1982 & Supp. III 1985), *as amended by* Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293, Congress granted independent counsel wide-ranging authority to investigate and prosecute members of the Executive Branch charged with criminal conduct, including the authority to participate or engage in any litigation he deems necessary, to appeal decisions in cases in which he participates, and to conduct cases in all courts of competent jurisdiction in the name of the United States. 28 U.S.C. § 594(a). *See generally In re Olson*, 818 F.2d 34 (D.C. Cir. 1987) (*per curiam*); *In re Sealed Case*, 665 F. Supp. 56 (D.D.C. 1987), *appeal docketed*, Nos. 87-5261, 87-5264, 87-5265 (D.C. Cir. Aug. 19, 1987); *North* v. *Walsh*, 656 F. Supp. 414 (D.D.C. 1987), *appeal docketed*, Nos. 87-5058, 87-5059 (D.C. Cir. Mar. 13, 1987).

CONCLUSION

The writ of *certiorari* should be dismissed.

Respectfully submitted,

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